SUPREME COURT, U.S.

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Supreme Court of the United States

October Term, 1964

No. 542

BENJAMIN PISANO,

Petitioner,

against

S. S. BENNY SKOU, her engines, boiler, tackle, etc., in rem, and OVE SKOU, D/S OVE SKOU, A/S and D/S af 1937 A/S,

Respondent,

against

JOHN T. CLARK & SON,

Respondent-Impleaded.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GOLDSTEIN & STERENFELD,
Counsel for Petitioner,
50 Broadway,
New York, New York 10004.

ALVIN P. APPELBERG,
Of Counsel.

HARVEY GOLDSTEIN,
on the Petition.

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Respondent-Impleaded.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Second Circuit, entered in the above entitled matter on June 7, 1965.

Opinions of the Courts Below

The opinion of the United States District Court for the Southern District of New York, Honorable Irving Ben Cooper, in favor of respondent and respondent-impleaded, reported at 220 F. Supp. 901, is set out in the appendix to this petition at pages 9-16.

The opinion of the United States Court of Appeals for the Second Circuit, affirming the decree of the District Court, unreported to date, is set out in the appendix to this petition at pages 19-21.

Jurisdiction

This suit, arising out of a maritime tort, and in the Admiralty and Maritime jurisdiction, was brought in the United States District Court for the Southern District of New York, in Admiralty.

The opinion of the District Court and decree entered thereon, dismissing the libel (and the impleading petition of respondent, Ove Skou), was appealed from by the petitioner.

The decision of the United States Court of Appeals for the Second Circuit, affirming the decree of the District Court, was filed and decree entered thereon on June 7, 1965.

The jurisdiction of the honorable Court is invoked pursuant to 28 U. S. C. § 1254(1).

Question Presented

Whether the Court below erred in negating the primary duty of the shipowner to provide a safe place to work and the duty of the stevedore to perform the cargo operation in a workmanlike manner, in view of the failure by the ship's officers and the stevedore boss to inspect, detect and correct the open and obvious hazardous condition of the preventer rigging, of which they knew or should have known, thus causing or contributing to the accident and petitioner's injuries.

Statutes Invoked

There are no statutes invoked herein.

Statement of Facts

Libelant, Pisano, a longshoreman, was employed by Clark, respondent-impleaded, a stevedoring firm engaged by respondent, Ove Skou, the owner of the "Benny Skou", which was berthed in the North River, New York City. On July 22, 1960, Pisano was on board the Benny Skou in charge of a gang of three longshoremen loading cargo at # 5 hatch. In the course of his duties at 1:00 o'clock the previous afternoon, July 21, 1960, Pisano himself had improperly rigged the port or inshore cargo boom, which was being used as the horizontal or burton boom, by failing to take a half-hitch knot as a safety device in the preventer wire, on the open deck, used as the main anchor for the boom. From that time until 5:00 P. M. on the 21st, cargo was continuously loaded onto the vessel. The work continued on the 22nd, starting at 8:00 A. M., that day, to 9:00 A. M. when the up-and-down boom was repositioned, and thereafter.

At about 10:00 A. M. Pisano properly stationed himself by the hatch to supervise the loading of two tons of ingots. As the load was lifted aboard, the burton boom swung sharply inboard out of control. The ingots carried by the boom were dumped to the deck, knocking a stack of hatchboards into Pisano and causing him to suffer substantial injuries.

Testimony was that the shipowner's Second Mate, its highest ranking officer aboard the vessel, had the duty to look after the cargo operation. Other deck officers were also aboard taking "care of ship's interests", that cargo be loaded in safety, that ship's equipment be used properly and to watch the loading operation.

The Mate stated that he was in the vicinity of the hatch in the afternoon of the 21st but made no inspection of the preventer rigging, that he did inspect both the up-and-down

and burton booms when the former was repositioned at 9:00 A. M. on the 22nd.

The stevedore hatch boss, in charge of the work gang, including Pisano, had the duty to instruct the men and to supervise the rigging, the use of the booms and the loading of cargo and had a primary function to see that "everything is in good working condition", that "everything is secured right", to supervise the men, to see that the men were doing their work and to look to their safety, walking around the deck as part of his duties to observe the rigging working conditions and "to see that such operation goes on correctly and in a safe manner".

The hatch boss was on deck the afternoon of the 21st and the morning of the 22nd and made no comment about the rigging although he inspected it as he always did.

The District Court's opinion was that "the absence of this knot made the preventer unsuitable for its intended purpose", that . . . "The M/S Benny Skou was unseaworthy at the time of (petitioner's) accident, since the preventer wire was not in a condition reasonably suitable for its intended use. The unseaworthiness resulting from the manner in which the preventer was rigged was the sole proximate cause of the injuries to (petitioner) . . . Since the vessel was unseaworthy only because of the absence of the half-hitch, a condition created by Pisano, this court finds him guilty of 100% contributory negligence".

The Court of Appeals affirmed, finding that "the shipowner or his employees had no duty to inspect every knot in the rigging of every cargo boom aboard ship. At most a general inspection of conditions on board rather than minute, continuous supervision of every detail entrusted to a responsible stevedoring firm was all that was needed to satisfy the duty of reasonable care under the circumstances."

Reasons for Granting the Writ

The decision of the Court below appears to be in conflict with decisions of other Courts in *Crumady* v. *Fisser*, 358 U. S. 423; *Connolly* v. *Weyerhaeuser*, 236 F. 2d 848, sub nom. *Weyerhaeuser* v. *Nacirema*, 355 U. S. 563; *Beard* v. *Ellerman*, 289 F. 2d 210, sub nom. *Atlantic* v. *Ellerman*, 369 U. S. 355; *Skovgaard* v. *Tungus*, 252 F. 2d 14, 358 U. S. 588; *Gutierrez* v. *Waterman*, 373 U. S. 206; *Ferrante* v. *Swedish*, 331 F. 2d 571 (3C); *Knox* v. *United*, 249 F. 2d 354 (3C); *Brabazon* v. *Belships*, 202 F. 2d 904 (3C); *Aldridge* v. *States*, 265 F. 2d 554 (9C), and would seem to call for review of the entire matter by this Honorable Court.

The Court below rejected the concept of any duty by the shipowner to inspect the rigging of the preventer wire created by the petitioner some twenty-one hours, through six hours of actual work operation time, before petitioner was injured.

Further, the Court below rejected the thought that the stevedore had any responsibility to inspect, detect and correct any defects in its work performance throughout the operational period.

The defective condition herein was created by the petitioner twenty-one hours before the accident, six hours of actual work time, a period when both the shipowner, through its officers, and the stevedore should have been inspecting and supervising the work operation and maintaining the vessel. The rigging of the preventer wire was on the open deck, itself open for observation. The testimony of the Mate and of the longshoremen made it perfectly clear that part of the shipowner's and stevedore's duties was to inspect the rigging, that at times they did and at times they did not.

The preventer wire rigging was of extreme importance to the entire stevedore operation since upon its proper completion rested the safety of the entire ship.

As such, the failure of ship's officers to inspect the burton boom rigging on the open deck over the extended period of time or, if there was an inspection, to detect the improperly rigged preventer can only be characterized as an irresponsible surrender of duty—an intervening negligent force subsequent to the petitioner's misdeed. That failure to act was the proximate cause of the accident for which the shipowner should be liable.

The failure of proper inspection of the rigging by the stevedore boss so as to detect the lack of the half-hitch was a failure to perform in a workmanlike manner, *Palazzolo* v. *Pan-Atlantic,* 211 F. 2d 277, *sub nom. Ryan* v. *Pan-Atlantic,* 350 U. S. 124; *Italia* v. *Oregon,* 376 U. S. 315; *Ferrante* v. *Swedish, supra; Nicroli* v. *Den,* 332 F. 2d 651 (2C); *DeGioia* v. *United,* 304 F. 2d 421 (2C); *Caputo* v. *United,* 311 F. 2d 413 (2C); *Santomarco* v. *United States,* 277 F. 2d 255 (2C); *Smith* v. *Jugosalvenska,* 278 F. 2d 176 (4C); *Calmar* v. *Nacirema,* 266 F. 2d 79 (4C), giving rise to liability upon the shipowner, with indemnification over from the stevedore.

It would appear that if the petitioner failed to properly knot the preventer, he has paid for it grievously. The trial Court laid the entire burden of the ship's safety upon him, negating entirely the overwhelming and primary responsibility of the shipowner to provide a safe place to work and of the petitioner's superiors to perform the cargo operations safely. While the petitioner's conduct was deemed sufficient to defeat his cause of action, the failure of all others over a period of six working hours and an actual twenty-one hours, was not held even to have *contributed* to the existence of the obvious, unseaworthy and long standing condition at 10:00 A. M. on July 22, 1960.

The negation of that duty resting upon the shipowner and upon the stevedore was error in failing to give proper weight to the duty visited upon the shipowner and upon the stevedore to inspect, detect and correct what hazardous condition was known, or should have been known, to exist.

While not attempting to establish an iron rule of extent of inspection necessary to meet the shipowner's duty to inspect,, the Courts have discussed that responsibility on the basis of general supervision and of an open and obvious defect, when not within the concept of general supervision.

The Court below restricted the demand solely to a general inspection, thus creating the right of a shipowner to blind itself to any defect outside its narrow scope of supervision when it knew or should have known of the danger facing the working longshoremen.

The creation of an ulitimate responsibility for the safety of the vessel upon the individual longshoreman can only lead to the destruction of the primary and non-delegable duty resting upon the shipowner and the stevedore to provide safety to those working aboard the vessel, aiding in the furtherance of ship's business.

As such, this Honorable Court should now reject any concept that would further the failure to inspect, detect and correct obvious and open defects and which would throw the cost of industrial injury upon those least able to afford that burden.

CONCLUSION

A writ of certiorari should be granted in accordance with the prayer of this petition.

Dated: September 3, 1965.

Respectfully submitted,

GOLDSTEIN & STERENFELD,
Counsel for Petitioner,
50 Broadway,
New York, New York 10004.

ALVIN P. APFELBERG,
of Counsel.

HARVEY GOLDSTEIN,
on the Petition.

APPENDIX

Opinion of United States District Court for the Southern District of New York

This is an action for personal injuries sustained by libelant, a longshoreman, aboard respondent's vessel. Jurisdiction is based upon the general maritime law of the United States. The trial was held before the court, sitting without a jury.[1]

Libelant was injured on July 22, 1960 aboard the M/S Benny Skou, a vessel owned, operated and controlled by the respondent, Ove Skou, etc. (hereinafter Ove Skou). At that time, libelant was employed by the respondent-impleaded, John T. Clark & Son, and was lawfully aboard the vessel performing ship's services.

Upon arrival of the M/S Benny Skou, in New York City, she berthed south of Pier 51, North River, port side to pier, with her bow facing in toward the shore.

On the afternoon of July 21, 1960, libelant and his fellow employees spotted the booms for the #5 hatch. These booms, which were located forward of the hatch, were rigged with a married fall, i.e., the lines from each of the winches were shackled together and then linked to a common cargo hook. The starboard, or offshore boom, was positioned over the hatch and was being used as the up-and-down boom. The port, or inshore boom, was positioned over the pier and was being used as the burton boom.

The longshoremen, after positioning the booms, secured them by means of various guy lines and preventer wires. A schooner guy, running between the heads of the two booms, was secured and a guy line was run from the head of the burton boom forward to a padeye on the deck. This

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[1] At the outset of the trial libelant moved to discontinue as against Anchor Line, Ltd., and upon consent of all parties, the libel, and all other claims, made by and against Anchor Line, were dismissed and Anchor Line was eliminated from the case.

guy line was composed of manila rope approximately 2½" in circumference. The preventer wire, 6 x 19, was of the same circumference. The manner in which the preventer wire was rigged is one of the main disputes.

Approximately four months prior to the accident, the M/S Benny Skou was docked in New York City and similar cargo operations were performed. At that time, the preventer wire for the burton boom at the #5 hatch had been run from the head of the boom to the bottom horn of a vertical cleat, and then figure-eighted around the cleat to secure it—apparently the procedure followed theretofore. However, on that occasion, the bottom horn of the cleat snapped off and the preventer loosened. Whereupon the hatch boss, one Willie Cremona, instructed the longshoremen (among whom was the libelant herein) to rerig the preventer by putting it through a swinging-link ring bolt on the deck, then running it through the eye of a turnbuckle on the mast stay (approximately 3-4′ aft), back through the swinging-link, then through the eye on the stay for a second time and back through the swinging-link for a third time. The longshoremen were told to put a half-hitch in the preventer wire and tie off the free end with a piece of manila yarn. The purpose of the half-hitch was to stop the preventer from running when stress was applied. The end of the wire was tied off to keep the half-hitch from becoming undone.

Between the time that the horn of the cleat snapped off and the time of libelant's accident, the M/S Benny Skou called at New York three or four times. The broken cleat was never repaired and the preventer wire continued to be rigged in the manner described above.

On July 21, 1960, the booms were positioned and the preventer wire rigged in a manner generally as just described and more particularly discussed below. The following morning, when the longshoremen returned to work the booms were in the same position. The loading of general cargo began with libelant acting as gangwayman.

At 9 A.M. on July 22, 1960, libelant went on his hour relief, Engel, one of libelant's co-workers, took over as gangwayman. During this time, the loading of general cargo was completed and two aluminum ingots (weighing a total of 1½-2 tons) were placed on a pallet for loading. The draft was hooked up and raised slightly to check the load.[2]

At this point, at approximately 10 A.M., Pisano returned to his duties, and Engel, after ascertaining that everything was satisfactory, ordered the draft lowered to the dock, and returned to his duties as winchman. Libelant then assumed the duties of gangwayman and supervised the loading of the ingots. As the draft began to come athwartships, Pisano stationed himself at the after end, port side of the hatch, in order to direct operations. At that point, he was standing between the coaming of the hatch and the hatch board covers stacked on the inshore side.

Suddenly, a rumbling, tearing noise was heard, the burton boom swung laterally towards the hatch, and the draft fell against the hatchboards hurling them upon libelant. Pisano sustained comminuted fractures of the left tibia and fibula, was removed from the vessel by stretcher and taken to the hospital by ambulance.

After the accident, it was seen that the rope guy had parted approximately 30′ above the deck and the preventer wire was slack, indicating that it must have run, since there was no break in it.

The overwhelming weight of the credible testimony established that rigging the preventer wire by running it through the swinging-link three times, interspersed with two turns through the eye in the mast stay, followed by a half-hitch and a lashing off of the end of the wire (this method will hereafter be referred to as the non-cleat method) was as satisfactory a method of rigging as figure-eighting the preventer around the cleat. The total evidence

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[2] Maximum stress is not placed upon the lines and booms by this small lifting.

revealed that the non-cleat method was a safe and suitable method for securing the preventer wire. In point of fact, during the calls in New York between the time the cleat broke and the accident to libelant, the preventer wire was rigged in the non-cleat method without mishap.

Since the proper rigging of the preventer wire in the non-cleat method was satisfactory for the purposes intended, the fact that the cleat was broken has no bearing on this case. A broken cleat would render a vessel unseaworthy insofar as procedures involving the employment of the cleat are concerned. In the instant case, however, a perfectly suitable alternative method of rigging had been adopted. Thus, though the broken cleat might make the vessel unseaworthy, such unseaworthiness was clearly not the proximate cause of libelant's accident. Only if no other safe method of rigging the preventer was available could the condition of the cleat be considered a proximate cause of libelant's accident.

The proper rigging of the preventer in the non-cleat method required that a half-hitch be placed in it after all the turns had been taken. As already pointed out, the purpose of the half-hitch was to keep the preventer from running when stress was applied to it.

This particular half-hitch is a vital element in the case. Further discussion of it makes necessary a few remarks about the respective functions of the guy line and the preventer wire. The guy line was used initially to position the boom. It was then secured to aid in keeping the boom in position. In order to accomplish this, the tension on it and the preventer wire, were equalized. However, the preventer wire was the most important line to maintain the position of the boom and keep it from swinging laterally. As such, it was designed to bear most of the strain, and therefore must be taut. The half-hitch was put in it to stop the preventer from running when a strain is placed on it.

At the trial, Pisano was not questioned as to how the preventer wire was rigged the day before his accident or who rigged it. But during the two examinations before

trial (Libelant's Exhibits 14 & 15) he stated in effect that he rigged the preventer and tied it off by lashing the end without tying a half-hitch in the wire.

The Second Mate of the M/S Benny Skou, Nielsen, stated that he looked at the preventer after the accident, and saw the end still lashed off (though part of the manila yarn had been cut). However, he found no half-hitch present in the wire.

This court finds that libelant, himself, rigged the preventer, and in the course of doing so unfortunately failed to put in a half-hitch. The absence of this knot made the preventer unsuitable for its intended purpose because when strain was applied, the preventer began to run and a greater stress was placed upon the guy line. This increased strain, which the guy line was not meant to bear, caused it to break. When this happened, the boom swung laterally across the ship, and the draft of ingots struck the hatch boards, resulting in libelant's injuries.

From the total evidence, this is the most plausible explanation of the cause of the accident. The various theories advanced by libelant as to the causes of the accident are not sustained by the facts. The evidence to support them falls far short of sustaining the libelant's burden of proof, both quantitatively and qualitatively.

As to the rope guy line, there was no evidence that it broke before the preventer ran. The expert testimony was all to the effect that the guy line was not meant to withstand the total stress of the boom while a draft of cargo was being burtoned thwartships.[3] The testimony further revealed that the running of the preventer put an abnormal strain on the guy line causing it to break.

Nor is there any evidence that the guy line was defective. Even assuming, arguendo, that the guy broke first because of some internal defective conditions, the preventer wire could

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[3] The greatest strain on the rig, booms, lines and preventer occurs while the cargo was moved laterally, rather than when the draft was merely raised or lowered.

have withstood the additional strain if it had been rigged properly in the non-cleat method. But, without a half-hitch in it, the wire would have run with the extra strain on it. The boom would then have moved laterally due to the absence of the half-hitch.

There has been testimony that the preventer wire was in a rusted, kinky and bent condition; that the longshoremen were unable to straighten the wire with their hands as they secured it; that because of this they were unable to secure the preventer properly and that there was some slack in it. The evidence on these points is insufficient and consequently unconvincing.

Libelant's theory apparently is that the guy line broke because of a defective condition; that the release in tension allowed the burton boom to swing; that the boom was able to swing because of the slack in the preventer and that once having taken up the slack, the one-ton boom continued to move laterally and the presence of the half-hitch would not have been able to stop it.

The proof does not support this theory. Inference piled upon inference can not substitute for tangible evidence. In addition to the unsatisfactory testimony as to kinks and rust, Engels stated that he especially noticed this condition in the last 10 feet of the wire. Yet libelant himself testified that when he rigged the preventer there was about 10 feet of wire left after it was lashed. Thus, the very portion of the wire which was identified as being most kinky, would have no affect on the accident. Slack resulting from kinks, bends and rust would only play a part if it were in that portion of the preventer leading from the head of the burton boom to the swinging-link, or in that part of the preventer wound through the swinging-link and the eye on the turnbuckle stay. This court finds that the preventer wire was not in such a kinky, rusted or bent condition as to produce slack in the wire or to have any other causal relation to the accident.

We should mention two changes in the loading operation just before the accident.

First: The weight of cargo being loaded was almost doubled. On the afternoon of July 21 and the early morning of July 22, 1960 the longshoremen were loading general cargo which weighed approximately 1 ton. At the time of the accident, the first draft of aluminum ingots was being loaded. The weight of this draft was approximately 1½-2 tons. Though within the safe working load for the booms, it greatly increased the strain on the preventer wire.

Second: Between 9 A.M. and 10 A.M. on July 22 (prior to loading the ingots), the offshore up-and-down boom had been repositioned by lowering its head in order to reach the after end of the number 5 hatch. The expert testimony indicated that the effect of this was also to increase the strain on the preventer wire and guy line for the burton boom.

The combination of these two factors caused the preventer to start running. The undue strain placed on the guy line caused it to break, and the boom to swing laterally.

Libelant maintains that there is no testimony that the rigging done by him on July 21 was still in existence at the time of the accident. This is inaccurate. The overwhelming weight of testimony (principally from libelant's own witnesses) is that the booms were not repositioned or rerigged when the longshoremen returned to work on July 22. Actually, during the work that morning, only the up-and-down boom was moved.

Libelant's claim that the demonstration model of the non-cleat method (Respondent's Exhibits D, D, and D2) was deceptive in without merit. This model was not introduced to show the tensile strength of the wire but merely to demonstrate to the court the proper manner by which the preventer should be rigged when the non-cleat method is used.

Respondent's contention that libelant was guilty of contributory negligence because of the place in which he was standing at the time of the accident is likewise without merit. Under the circumstances, libelant was in a safe

place to properly perform his work. Nor is there evidence that the hatchboards were improperly stacked or placed on the deck.

In brief summation then, this court finds that it was safe and proper to rig the preventer wire by the non-cleat method. But the rigging in the instant case was inadequate since there was no half-hitch. The absence of this knot allowed the preventer to run for it was unable to withstand the stress it was meant to absorb. The M/S Benny Skou was unseaworthy at the time of libelant's accident, since the preventer wire was not in a condition reasonably suitable for its intended use. The unseaworthiness, resulting from the manner in which the preventer was rigged, was the sole proximate cause of the injuries to libelant.

However, libelant himself was the person who rigged the preventer and failed to put a half-hitch in it. Pisano's failure to do this made him guilty of contributory negligence. Since the vessel was unseaworthy only because of the absence of the half-hitch, a condition created by Pisano, this court finds him guilty of 100% contributory negligence.

Accordingly, judgment shall be entered for respondent, Ove Skou, against libelant. The third-party action and all claims arising therefrom are dismissed.

This opinion shall constitute the court's findings of fact and conclusions of law.

So ordered:

Irving Ben Cooper,
United States District Judge.

New York, N. Y.
August 2, 1963

Decree of the United States District Court for the Southern District of New York

This suit having come on for trial before the Honorable Irving Ben Cooper, U.S.D.J., on May 20, 21, 22, 23, 24, 27 and 28, 1963, and Alvin I. Apfelberg, Esq., having appeared as proctor for libelant, Messrs. Haight, Gardner, Poor & Havens, David P. H. Watson and Robert K. Marzik of counsel, having appeared as proctors for respondent Ove Skou, et al., and Messrs. Alexander, Ash & Schwartz, Joseph Arthur Cohen, of counsel, having appeared as proctors for respondent-impleaded, and the Court, having at the close of the trial on May 28, 1963, reserved decision and having asked for the submission of post-trial memoranda, and proctors for the respective parties having thereafter submitted said memoranda, and the Court, after due deliberation, having handed down its memorandum opinion, dated August 2, 1963, and filed in the Office of the Clerk of the United States District Court for the Southern District of New York on that same date, in which the Court held that judgment was to be entered for respondent Ove Skou, et al., as against libelant, and that the third-party actions and all claims arising therefrom were to be dismissed, it is now

ADJUDGED AND DECREED, that the libel of Benjamin Pisano, libelant, against respondent Ove Skou, D/S Ove Skou A/S & D/S of 1937 A/S be and the same hereby is dismissed with prejudice and with costs to be taxed by the Clerk of this Court, and it is further

ADJUDGED AND DECREED, that the impleading petition of respondent-petitioner, Ove Skou, D/S Ove Skou A/S & D/S of 1937 A/S against John T. Clark & Son be and the same hereby is dismissed as moot with costs to be taxed by the Clerk of this Court, and it is further

ADJUDGED AND DECREED, that the counter-claim of John T. Clark & Son, respondent-impleaded, against respondent-petitioner Ove Skou, D/S Ove Skou A/S & D/S of 1937 A/S be and the same hereby is dismissed as moot, and it is further

ADJUDGED AND DECREED, that the counter-claim of respondent-impleaded, John T. Clark & Son, against libelant, Benjamin Pisano, be and the same hereby is dismissed as moot.

Dated: New York, N. Y., August 16, 1963.

IRVING BEN COOPER,
U. S. D. J.

Opinion of the United States Court of Appeals for the Second Circuit

Before:

MOORE, KAUFMAN and HAYS,
Circuit Judges.

Appeal by the libellant Benjamin Pisano from a decree of the District Court for the Southern District of New York, Irving Ben Cooper, *J.*, sitting without a jury, 220 F. Supp. 901 (1963), dismissing a libel against the S. S. "Benny Skou" *in rem* and her owner, Ove Skou, dismissing as moot the impleading petition of respondent-petitioner Skou against John T. Clark & Son, respondent-impleaded, and dismissing as moot counterclaims of John T. Clark & Son against Skou and Pisano. Cross-appeal by respondent-impleaded.

HARVEY GOLDSTEIN, New York, New York (Alvin P. Apfelberg, New York, New York, of counsel, Goldstein & Sterenfeld, New York, New York, on the brief), for Libellant-Appellant.

DAVID P. H. WATSON, New York, New York (Haight, Gardner, Poor & Havens, New York, N. Y., of counsel), for Respondent-Petitioner-Appellee.

JOSEPH ARTHUR COHEN, New York, New York, (Alexander, Ash & Schwartz, Sidney A. Schwartz, New York, New York, of counsel), for Respondent-Impleaded-Appellee.

MOORE, *Circuit Judge*:

Libellant, Benjamin Pisano, appeals from a decree dismissing his action for personal injuries against the S.S. Benny Skou, *in rem* and Ove Skou, the shipowner.

Pisano was employed by Clark, a stevedoring firm engaged by Ove Skou, the owner of the "Benny Skou," which

was berthed at Pier 51, North River. On July 22, 1960, Pisano was on board the Benny Skou in charge of a gang of three longshoremen loading cargo at #5 hatch. In the course of his duties, Pisano himself rigged the port or inshore cargo boom which was being used as the horizontal or burton boom. At about 10:00 A.M. Pisano properly stationed himself by the hatch to supervise the loading of two tons of ingots. As the load was lifted aboard, the burton boom swung sharply inboard out of control. The ingots carried by the boom were dumped to the deck, knocking a stack of hatchboards into Pisano and causing him to suffer substantial injuries.

The District Court dismissed Pisano's libel and the indemnification claims, which depended on the disposition of the libel, on the ground that Pisano's injury was due entirely to his own carelessness in failing to take a half-hitch as a safety device in a preventer wire used as the main anchor for the burton boom.

Pisano argues that he presented sufficient evidence to show that the accident was caused by some other fault in the rigging of the boom or at least that the absence of a half-hitch in the preventer wire was not the cause of the accident. The record reveals that Pisano presented no concrete proof of the cause of the accident. Pisano himself testified on examination before trial that he had, in fact, carried out his duty to rig the burton boom but had not taken a half-hitch in the preventer. An investigation after the accident established that the preventer had run free and there was ample expert testimony to establish that the preventer would not have come loose under the strain of a two-ton load if a half-hitch had been taken. In this context, the trial court's conclusion that Pisano was "guilty of 100% contributory negligence," 220 F. Supp. at 905, was reasonable and must be affirmed because not shown to be clearly erroneous. *Gruja* v. *United States Lines Co.*, 337 F. 2d 375 (2d Cir. 1964).

Pisano also argues that the trial court erred in denying him any recovery since the shipowner had a duty to pro-

vide safe working conditions aboard ship. However, the court's conclusion that "the unseaworthiness [of the "Benny Skou"], resulting from the manner in which the preventer was rigged, was the *sole* proximate cause of the injuries to libelant," 220 F. Supp. at 905 (emphasis supplied), indicates that the court considered the shipowner's possible liability and resolved the issues against Pisano. The District Court would have had to strain to find negligence in this case since the shipowner or his employees had no duty to inspect every knot in the rigging of every cargo boom aboard ship. At most a general inspection of conditions on board rather than minute, continuous supervision of every detail entrusted to a responsible stevedoring firm was all that was needed to satisfy the duty of reasonable care under the circumstances. And, even if the shipowner must share in the abstract any liability for breach of the seaworthiness warranty with the impleaded respondent Clark, *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85, 89-100 (1946), it is clear that compliance with the warranty does not require an accident-free vessel. *Mitchell* v. *Trawler Racer, Inc.,* 362 U. S. 539 (1960).

Affirmed.

Decree of United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventh day of June, one thousand nine hundred and sixty-five.

Present:

HON. LEONARD P. MOORE,
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
Circuit Judges.

[SAME TITLE]

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed with costs to respondent appellee SS Benny Skou, etc., and to respondent impleaded appellee John T. Clark & Son.

A. DANIEL FUSARO
Clerk

Office-Supreme Court, U.S.
FILED
SEP 30 1965
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1965

No. 542

BENJAMIN PISANO,

Petitioner,

—against—

S.S. BENNY SKOU, her engines, boiler, tackle, etc., *in rem,* and OVE SKOU, D/S OVE SKOU, A/S and D/S af 1937 A/S,

Respondent,

—against—

JOHN T. CLARK & SON,

Respondent-Impleaded.

BRIEF OF RESPONDENT-IMPLEADED, JOHN T. CLARK & SON, IN OPPOSITION TO PETITION FOR CERTIORARI

SIDNEY A. SCHWARTZ
Counsel for Respondent-Impleaded, John T. Clark & Son
76 Beaver Street
New York, New York 10005
(212) WH 4-2633

JOSEPH ARTHUR COHEN,
Of Counsel.

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Supreme Court of the United States

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BRIEF OF RESPONDENT-IMPLEADED, JOHN T. CLARK & SON, IN OPPOSITION TO PETITION FOR CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Opinions of the Courts Below

The opinion of the United States District Court for the Southern District of New York is reported at 220 F. Supp. 901; and its affirmance by the United States Court of Appeals for the Second Circuit is reported at 346 F. 2d 993.

Statement

The apocryphal lawyer's tale of pounding the table and shouting about the law when the facts are against you, and vice versa, has been followed by petitioner herein. Having failed to satisfy both the District Court and the Circuit Court that he had adduced sufficient proof to support his claim, petitioner now seeks to obtain a new trial by masking such failure of proof with a question begging and unrelated legal issue.

Thus, the opinion of the Hon. Irving Ben Cooper, who tried the matter as an Admiralty cause, states (as reprinted at page 13 of the petition):

> "The various theories advanced by libelant as to the causes of the accident are not sustained by the facts. The evidence to support them falls far short of sustaining the libelant's burden of proof, both quantitatively and qualitatively."

Further commenting upon libellant's contention as to the cause of the accident, the Trial Judge added (as reprinted at page 14 of the petition):

> "The proof does not support this theory. Inference piled upon inference can not substitute for tangible evidence."

Indeed, the Trial Judge rejected as unproven petitioner's contention that the accident was caused by a defective condition in a guy line, and found rather that it was brought about solely by petitioner's failure to place the required half-hitch in the preventer wire rigged by him.

In affirming the dismissal of the libel herein, the Court of Appeals for the Second Circuit states (as reprinted at page 20 of the petition):

> "The record reveals that Pisano presented no concrete proof of the cause of the accident."

The Questions Presented

The real questions presented herein are (1) did petitioner adduce sufficient proof in support of his claim, and (2) whether a longshoreman injured solely by his own fault, and who has already received the benefits of the *Longshoremen's and Harbor Workers' Compensation Act,* is entitled to recover further damages for such injury from the innocent owner of the ship on which the accident occurred.

Significantly, petitioner does not challenge the findings regarding his failure of proof and, therefore, tacitly concedes the first issue and most probably renders everything else academic.

Reasons for Denying the Writ

1. *The issue is not of sufficient importance to warrant the attention of this Court.*

The failure of this petitioner during the course of a seven-day trial to prove his contention that on the 22nd day of July 1960 a guy line of the S.S. BENNY SKOU was defective and caused his injury, which failure of proof was affirmed by the Circuit Court, does not contain any issue of widespread importance or application. This petitioner's failure of proof, like any party's failure of proof, is a limited, local and provincial issue of importance solely to

that party. It is neither of nationwide nor industrywide interest. It has no far reaching significance. It does not warrant this Court's limited time and attention in view of the many questions of vast import to society clamoring for that same time and attention.

2. *There is no conflict between the circuits.*

Not a single one of the cases cited by petitioner as evidence of a decisional conflict involves the situation of a maritime worker being found to have been *solely* at fault for his own injuries. Petitioner's authorities are, therefore, completely inapposite.

When we examine the authorities involving accidents caused *solely* by some negligent act of the injured man, we find that there is unanimity in denying recovery. Thus, in *Donovan* v. *Esso Shipping Co.*, 259 F. 2d 65 (3 Cir. 1958), the plaintiff was injured by a falling boom which fell only because the plaintiff had mistakenly loosened the topping lift cable, and plaintiff was denied a recovery. Similarly, in *Williams* v. *S.S. Richard de Larringa,* 287 F. 2d 732 (4 Cir. 1961), a plaintiff-longshoreman was denied a recovery for injuries caused solely by his application of undue force to a wheel used to raise the hatch. And, in *Holmes* v. *Mississippi Shipping Company,* 301 F. 2d 474 (5 Cir. 1962), a schizoid seaman was held not entitled to recover damages for self-inflicted personal injuries resulting from his own schizophrenia.

3. *The opinion of the Court of Appeals is not contrary to any decision of this Court.*

The refusal of the Court of Appeals to give a longshoreman, injured *solely* by his own fault, and who has already recovered the benefits of the *Longshoremen's and*

Harbor Workers' Compensation Act, a damage award against an innocent shipowner is completely in accord with the holding of this Court that a shipowner is not obligated to furnish an accident-free ship, *Mitchell* v. *Trawler Racer, Inc.,* 362 U. S. 539. As the progeny of *Mitchell* indicate, a shipowner is not legally liable for the mere fact of a shipboard accident, *Blier* v. *U. S. Lines Co.,* 286 F. 2d 920 (2 Cir. 1961).

To give this plaintiff a recovery under the circumstances involved in this case would, on the other hand, be completely contrary to the holding of this Court in *West* v. *United States,* 361 U. S. 118, that a shipowner is not responsible to the employee of a shoreside contractor injured solely by the details and method of the work.

CONCLUSION

The so-called "Question Presented" in the petition is purely a creation of the Petitioner and does not really touch upon the issue involved in this case. The real issue in controversy herein was plaintiff's failure to prove that the accident was caused by a defective guy rope as alleged, and the well supported and documented findings of fact that the accident was caused solely by plaintiff's own negligence.

These factual findings, which petitioner does not here challenge, resulted in a dismissal of his action and such dismissal is completely in accord with the results reached in other Circuits in cases involving injury caused *solely* by a negligent act of the injured man himself. The end result is also in accordance with the decisions of this Court and the principles of law emanating therefrom.

Petitioner's failure of proof is not of sufficient importance to warrant the time and attention of this Honorable Court, and there appears to be no reason whatsoever why this case should be reviewed by this Court.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

SIDNEY A. SCHWARTZ
Counsel for Respondent-Impleaded,
John T. Clark & Son
76 Beaver Street
New York, New York 10005
(212) WH 4-2633

JOSEPH ARTHUR COHEN,
Of Counsel.

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Supreme Court of the United States

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No. 542

BENJAMIN PISANO,

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against

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Respondent,

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Respondent-Impleaded.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT, OVE SKOU, D/S OVE SKOU A/S, AND D/S AF 1937 A/S IN OPPOSITION

J. WARD O'NEILL,
DAVID P. H. WATSON,
Counsel for Respondent, Ove Skou, D/S Ove Skou A/S, and D/S af 1937 A/S,
80 Broad Street,
New York, N. Y. 10004

ROBERT K. MARZIK,
of Counsel.

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BRIEF OF RESPONDENT, OVE SKOU, D/S OVE SKOU A/S, AND D/S AF 1937 A/S IN OPPOSITION

Opinions Below

The opinion of the United States District Court for the Southern District of New York, the Honorable Irving Ben Cooper, U. S. D. J., presiding, dismissing the libel is reported at 220 F. Supp. 901, and is set forth on pages 9-16 of petitioner's appendix.

The opinion of the United States Court of Appeals for the Second Circuit affirming the dismissal of the libel is reported at 346 F. 2d 993, and is set out on pages 19-21 of petitioner's appendix.

Jurisdiction

Petitioner asserts the jurisdiction of this Court under 28 U. S. Code § 1254(1).

Question Presented

We do not believe that the question presented on page 2 of the petition reflects accurately the testimony and proof offered upon the trial. The characterization of the preventer wire without its half-hitch as an "open and obvious hazardous condition" is not reflected in the testimony or the findings of the District Court. It is implicit in the affirming opinion of the Court of Appeals that petitioner's failure to put the necessary half-hitch in the preventer wire would only have been discoverable through a "minute, continuous supervision of every detail" of the stevedoring operation (346 F. 2d 995).

The sole question presented by this petition is whether this Court should undertake to review the findings of fact of the District Court, as unanimously affirmed by the Court of Appeals, that the sole proximate cause of the injuries sustained by petitioner was petitioner's own failure to rig the preventer wire in a proper manner and that petitioner was guilty of 100% contributory negligence.

Statement of Facts

We do not believe that the Statement of Facts set forth on pages 3 and 4 of the petition reflects accurately the testimony and the proof in this suit and would respectfully refer this Court to the opinions of District Judge Cooper and Circuit Judge Moore.

We would suggest that the relevant facts could be summarized as follows:

On the afternoon of July 21, 1960, petitioner was the gangwayman in a gang of longshoremen employed by re-

spondent-impleaded, John T. Clark & Son, to load cargo at No. 5 hatch of m/s Benny Skou, a vessel owned by respondent. Before any cargo was loaded petitioner and three other longshoremen rigged and spotted the ship's booms at that hatch. The vessel was port side to the pier and the port boom at No. 5 hatch was swung out over the pier by petitioner so that it would be in a position to pick up cargo from the pier. After the port boom had been so placed with the use of the rope guy, petitioner proceeded to rig the wire preventer, which was supposed to hold the boom in this position. The rope guy was made up of 2½ inch circumference manila rope having a breaking strain of 4,400 lbs. and a safe working load of 880 lbs. The wire preventer was 2½ inch circumference wire having a breaking strain of 47,600 lbs. and a safe working load of 9,400 lbs., or 4.7 tons.

After the rigging of the booms had been completed, petitioner and the other men in his gang loaded general cargo in one ton drafts without incident for the balance of the afternoon. On the following morning, July 22, 1960, general cargo was loaded in similar drafts for approximately an hour, again without incident. Shortly after 9:00 a.m. the longshoremen at No. 5 hatch lowered the head of the starboard boom so as to permit the loading of aluminum ingots in the after end of the hatch. No changes were made in the rigging of the rope guy or the wire preventer for the port boom. This lowering of the head of the starboard boom had the effect of increasing the interior runner angle between the two wires in the married fall rig, thereby increasing the lateral strain placed upon the wire preventer rigged to the head of the port boom.

The accident occurred when the first draft of aluminum ingots, which weighed approximately two tons, was being burtoned across the deck between the heads of the two booms. It was the function of the port boom's wire preventer to absorb the major portion of the strain and hold the boom in position over the pier. As the draft of alumi-

num ingots came across the deck the boom swung in sharply towards the center line of the vessel, the rope guy for the port boom parted, and the draft of aluminum ingots dropped to the deck and struck petitioner. The wire preventer did *not* part, but ran or rendered through the padeye and turnbuckle to which it had been rigged by petitioner. When the ship's second mate arrived at the scene of the accident he made a close inspection of the wire preventer and concluded that it had been rigged without a half-hitch, and had as a result exerted no restraining force whatsoever. It was obvious to him that the wire preventer had merely followed the movement of the boom.

On his two oral examinations before trial petitioner admitted that he had failed to put a half-hitch in the wire preventer as the last step in the rigging procedure when he personally rigged the preventer. Even petitioner's fact witnesses admitted that the function of a half-hitch in such a rig was to prevent the wire from slipping or rendering when strain was applied. This was corroborated fully by the ship's officer and the two stevedoring experts. With no half-hitch in the wire preventer the burden of opposing the lateral stresses on the boom rested on the rope guy, which as indicated, had only 1/10th the potential strength of the wire preventer.

The District Court found that the intended function of the wire preventer was to absorb the major portion of the lateral stresses on the boom, that the wire preventer had not been able to fulfill this function because it had not been secured properly to the deck of the vessel, and that it was petitioner himself who had rigged the wire preventer in an improper manner. The Court was compelled to conclude that petitioner had brought about his own injuries. Whereas petitioner's improper rigging of the wire preventer created an unseaworthy condition on the vessel, petitioner was found to have been 100% contributorily negligent in that "the manner in which the preventer was

rigged, was the sole proximate cause of the injuries to libelant [petitioner]" (220 F. Supp. 905).

The Court of Appeals affirmed in an unanimous opinion pointing out that petitioner had presented no concrete proof of the cause of the accident, that he had admitted that it was his duty to rig the boom and had done so without taking a half-hitch in the wire preventer, that "there was ample expert testimony to establish that the preventer would not have come loose under the strain of a two-ton load if a half-hitch had been taken", and that the finding of 100% contributory negligence on the part of the petitioner was reasonable and, not having been shown to be clearly erroneous, would have to be sustained. Also sustained was the District Court's conclusion that petitioner's negligent rigging of the preventer was the sole proximate cause of the accident.

ARGUMENT

There Is No Conflict of Decision.

The sole reason asserted by petitioner for a granting of the writ is that "the decision of the Court below appears to be in conflict with"* five decisions of this Honorable Court, three decisions of the United States Court of Appeals for the Third Circuit, and one decision of the Court of Appeals for the Ninth Circuit.

A reading of the decisions cited by petitioner makes it quite obvious why the petition nowhere spells out the details of the alleged conflicts. Where the factual patterns can be considered comparable the cases are on all fours with the decisions below.

Whereas all the cases referred to on page 5 of the petition involved shipboard accidents, the similarity ends

* Page 5 of the petition.

right there. None involved a fact pattern where plaintiff or libelant, as the case might be, was solely responsible for the condition on the basis of which he was claiming against the shipowner.

None of the cases cited involved an unseaworthy condition which, far from being obvious and open, would only have been discoverable through "minute, continuous supervision of every detail" of the stevedore's work as in the instant suit.

The standard of care established by the Court below for a determination as to whether the ship's officers were negligent in having failed to discover petitioner's improper rigging of the wire preventer is identical to the standard of care established by the United States Court of Appeals for the Third Circuit in the cited cases of *Brabazon* v. *Belship Co., Ltd.*, 202 F. 2d 904 (3 C. A. 1953), *Knox* v. *United States Lines Company*, 294 F. 2d 354 (3 C. A. 1961) and *Ferrante* v. *Swedish American Lines*, 331 F. 2d 571 (3 C. A. 1964).

In *Knox* v. *United States Lines Company, supra,* Circuit Judge Hastie referred to *Brabazon* v. *Belship Co., Ltd., supra,* in defining the standard of care in the following terms (294 F. 2d 357):

> "As our decision in the Brabazon case indicates, the law does not impose a duty upon a ship to provide continuing observation and immediate supervision of work being done by a qualified independent contractor in unloading ordinary cargo. If an obviously hazardous condition had been created by the longshoremen and permitted to exist long enough for normal occasional observation of the course and progress of the work to disclose the existence of the danger to some officer of the ship, then the ship should have been found negligent."

In the later case of *Ferrante* v. *Swedish American Lines, supra,* the Court of Appeals reversed on the issue of

negligence, but only because the District Court had *not* adhered to the foregoing standard of care in determining whether the ship's officers had been negligent.

Nor is petitioner on good ground in asserting that there appears to be conflict between the decision below and the earlier decisions of this Honorable Court. For example, in *Skovgaard* v. *The Tungus,* 252 F. 2d 14 (3 C. A. 1957), affirmed 358 U. S. 588 (1959), Mr. Justice Stewart noted at 358 U. S. 594 that:

> "The majority in the Court of Appeals pointed out that the officers and crew of the *Tungus* remained in overall control of the vessel and that *they were well aware of the existence of the oil spill* and of the danger created by it for approximately an hour before Skovgaard arrived on board." (Emphasis supplied.)

The same distinction would have to be made with respect to the other decisions of this Court cited by petitioner. In all of them, without exception, the unseaworthy condition was known fully to the ship's officers long before the accident occurred. For example, in *Connolly* v. *Weyerhaeuser Steamship Company* v. *Nacirema Operating Co., Inc.,* 236 F. 2d 848 (2 C. A. 1956), later reversed on the issue of indemnity as between the steamship company and Nacirema in 355 U. S. 563 (1958), the United States Court of Appeals pointed out that it was a clear inference from the jury verdict in favor of plaintiff on the issue of negligence that the wooden shelter over the winch at No. 1 hatch had been built in New York before the ship arrived in Boston. This coupled with the testimony of the chief mate that it was his job to see to it that the shelters were taken down before the ship came to Boston made a finding of negligence a foregone conclusion. The defense put forward on behalf of *Weyerhaeuser,* the shipowner, was not that the mate was not under a duty to see that the shack was removed, but rather that the shack had in fact been removed, and could not, therefore, have caused the injury to the

plaintiff in Boston. The jury did not believe the witnesses who testified along these lines, for it concluded that the shack was still in position when plaintiff, the Boston longshoreman, was injured. The facts and circumstances of that case are so patently different from the instant suit that to say that one is in conflict with the other is untenable.

Equally untenable are the claimed conflicts existing between the decision below and *Crumady* v. *Joachim Fisser*, 358 U. S. 423 (1959) and *Gutierrez* v. *Waterman Steamship Corp.*, 373 U. S. 206 (1963), in the first of which the unseaworthy condition was brought about by the negligent setting of a safety device on the winches by the ship's crew, and in the second of which the trial court had held that the shipowner should have known of the defective condition of the bags of cargo carried on the ship, not only because the bags were still leaking while they were on the ship and beans were being spilled throughout the unloading, but also because coopers had come aboard in port in order to repair the torn bags during the course of the discharge. In short, the shipowner and its employees were held to have been on actual notice of the condition which eventually led to the injuries to the longshoreman. Such a fact pattern finds no reflection in the instant suit. The standard of care enunciated by Judge Moore in the decision below is on all fours, not only with the decisions of this Court, but with those of the other circuits as well.

There Is No Important Question of Federal Law.

Petitioner does not appear to claim that there is any important question of federal law requiring decision by this Court. We would agree. The only question posed by this case is whether petitioner should be entitled to recover when his injuries were brought about solely by his own individual failure to carry out his duties in a proper manner. Petitioner had admitted that it was his duty as gang-

wayman of the longshore gang to rig up the boom. He expressed the extent of these duties in the following terms:

> "Well, to see that my boom, the booms and the preventers, the guides [guys], and everything were secured right, to see that no one gets hurt, see if my cargo is hooked up the right way, and to give signals; that's it" (62b).*

Petitioner admitted that he was the boss of the deck men in his longshore gang (62b). Petitioner admitted on his two oral examinations before trial that he rigged the wire preventer in question, and admitted further that he had failed to take a half-hitch in the wire preventer as the final step in the rigging. Obviously, petitioner failed in his duty to see to it that the preventer was "secured right". Ironically enough, petitioner himself was the one who sustained an injury as a result of this improper rigging. Since the failure of petitioner himself to put the necessary half-hitch in the wire preventer was found both by the District Court and by the Court of Appeals to be the sole, proximate cause of petitioner's injuries, it is hard to understand how petitioner could be entitled to recover monies in a court of law over and above the amounts to which he would be entitled under the terms of the Longshoremen's & Harbor Workers' Compensation Act (33 U. S. Code, Section 901, *et seq.*).

The Decision Below Is Clearly Correct.

In order to upset the decisions below, petitioner would have to establish that the following findings of the District Court (unanimously affirmed by the Court of Appeals) were not so:

---

* Numbers followed by the letter (b) refer to pages in respondent-petitioner-appellee's appendix in the United States Court of Appeals for the Second Circuit.

1. That it was part of petitioner's duties to rig the wire preventer.

2. That petitioner did in fact rig the wire preventer.

3. That in rigging the preventer petitioner failed to take a half-hitch in the wire as the last step in the rigging.

4. That the sole proximate cause of the injuries sustained by petitioner was the manner in which the preventer had been rigged by petitioner himself.

5. That petitioner was guilty of 100% contributory negligence in having brought about his own injuries.

Petitioner has, in effect, taken upon himself the burden of establishing that the findings of the courts below were clearly erroneous. At the risk of going over too-familiar ground, we would refer this Honorable Court to the decision of *McAllister* v. *United States*, 348 U. S. 19, 20 (1954), where at 348 U. S. 20 it was stated:

> "In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not set aside the judgment below unless it is clearly erroneous. No greater scope of review is exercised by the appellate tribunals in admiralty cases than they exercise under Rule 52(a) of the Federal Rules of Civil Procedure."

The pertinent portion of Rule 52(a) of the Federal Rules of Civil Procedure reads as follows:

> "* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *"

It is perhaps unnecessary to note that the *McAllister* rule has full vitality today. The United States Court of

Appeals for the Second Circuit was most certainly aware that it was not involved in a trial *de novo,* since it noted that the District Court's finding of 100% contributory negligence had not been shown to be clearly erroneous, and cited its own most recent decision on the point, *Gruja* v. *United States Lines Company,* 337 F. 2d 375 (2 C. A. 1964) where the Court stated, while citing *McAllister* v. *United States, supra,* that since it appeared that the District Court's assessment of credibility and resultant findings of fact were not clearly erroneous within the meaning of Rule 52 of the Federal Rules of Civil Procedure, and since there was substantial evidence in the record to support such findings, the decision below would have to be affirmed, especially since an Appellate Court should not lightly substitute its judgment for that of the trier of the fact

For that matter, the testimony and the proof in this case left virtually no room for the Court of Appeals to disagree with the findings and conclusions of the Trial Court. Perhaps one of the most surprising aspects of the entire case is that the testimony of the witnesses, whether called by petitioner or by the other parties to the suit, was so uniform. There was virtually no disagreement as to the manner in which the wire preventer had been rigged, no disagreement as to the occurrence of the accident, no disagreement as to the necessity for a half-hitch in the rig, no disagreement that petitioner had failed to put a half-hitch in the wire and, except for fine semantic distinctions, no disagreement among the fact and expert witnesses as to the intended functions of the various elements of the rigging.

The Trial Court stated that the theories of liability advanced by petitioner were not sustained by the facts, and that there were no tangible findings to support petitioner's claim that his injuries were caused by a defect in the rope guy. The Court of Appeals agreed, stating that the trial record revealed that petitioner "presented no concrete proof of the cause of the accident."

The proof in the case leaves no room for any conclusion as to the cause of the accident other than that arrived at by the Courts below.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

J. Ward O'Neill,
David P. H. Watson,
Counsel for Respondent, Ove Skou, D/S Ove Skou A/S, and D/S af 1937 A/S,
80 Broad Street,
New York, N. Y. 10004

Robert K. Marzik,
of Counsel.

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Supreme Court of the United States

October Term, 1965

No. 542

BENJAMIN PISANO,

Petitioner,

against

S. S. BENNY SKOU, her engines, boiler, tackle, etc., in rem, and OVE SKOU, D/S OVE SKOU, A/S and D/S af 1937 A/S,

Respondent,

against

JOHN T. CLARK & SON,

Respondent-Impleaded.

PETITIONER'S REPLY BRIEF

GOLDSTEIN & STERENFELD,
Counsel for Petitioner,
50 Broadway,
New York, New York 10004.

ALVIN P. APFELBERG,
of Counsel.

HARVEY GOLDSTEIN,
on the Brief.

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PETITIONER'S REPLY BRIEF

While the findings of the District Court were challenged in the Court below, following the settled rule of this Court that affirmed findings cannot be reviewed, petitioner has not taken issue with said findings and admits, without reservation, that petitioner improperly rigged the preventer wire which created an unseaworthy condition and which, some six working hours later, resulted in the accident and petitioner's injuries.

The District Court, in its opinion, did not take up the question of primary duty of the shipowner and of the stevedores to inspect, detect, and correct an open defect of which it knew or should have known. Its decision of some eight pages (pp. 9-16) [1] did not have a single word as to whether the shipowner used reasonable care to carry out its obligation and whether the stevedore performed in a workmanlike manner, retaining control over the opera-

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[1] Pages of Appendix.

tion by reasonable normal observation of the activity aboard its ship in order to carry out the continuing duty to provide the petitioner and his fellow workers with a seaworthy vessel and with a safe place to work.

The District Court, in exquisite detail, outlined the past history of the vessel and followed the activities of the petitioner and of the stevedore operation step by step from the time the vessel docked and work began at 1:00 P.M. on July 21st until the collapse of the boom at 10:00 A.M. on July 22nd. Throughout all of the opinion not a word was written about the duties, responsibilities or activities of any one other than the work gang, including petitioner, yet the Court of Appeals concluded that the entire issue of whether the shipowner, through its officers and crew members, or the stevedore, through its boss, carried out their duties toward the petitioner, was fully determined. The sentence: "The unseaworthiness, resulting from the manner in which the preventer wire was rigged, was the sole proximate cause of the injuries to libellant" (p. 16), was in fact held to be a full decision of the issue.

And so—with the use of one word upon which to base its decision and with total silence even to the presentation of the issue, the Court below ruled that it had been fully discussed and determined by the District Court.[2] Certainly the sentence was open to the interpretation that the petitioner was solely liable for creating the condition—as it is admitted he was for the purpose of argument.

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[2] If "sole" was a determination that the shipowner and stevedore carried out their responsibilities toward the petitioner, what was the District Court's basis for such finding? Where was the discussion of that responsibility and how that duty was fulfilled? Where was the discussion of the law applicable to the issue of such importance as to be the basis for the decision of the Court below?

Employment of the word out of all context has lead to the destruction of the petitioner's case—and not on the basis of findings but on the basis of absence of any findings at all.

The cases cited by petitioner all deal with the question of shipowner and stevedore duty toward business invitees. The different fact patterns cannot change the applicability of the rule of law whether the shipowner "knew" rather than "should have known" of the danger as in *Skovgaard* v. *Tungus*, 252 F. 2d 14 (3C), 358 U. S. 588 and *Connolly* v. *Weyerhaeuser*, 236 F. 2d 848 (2C), sub nom. *Weyerhaeuser* v. *Nacirema*, 355 U. S. 563, or whether non-liability was predicated upon lack of reasonable time to correct as in *Knox* v. *United*, 294 F. 2d 354 (3C). The other cases cited by petitioner, *Crumady* v. *Fisser*, 358 U. S. 423; *Beard* v. *Ellerman*, 289 F. 2d 201 (3C), sub nom. *Atlantic* v. *Ellerman*, 369 U. S. 355; *Gutierrez* v. *Waterman*, 373 U. S. 206; *Ferrante* v. *Swedish*, 331 F. 2d 571 (3C); *Brabazon* v. *Belships*, 202 F. 2d 904 (3C) and *Aldridge* v. *States*, 265 F. 2d 554 (9C), discussed the duty to inspect, detect and correct an open and obvious danger and predicated liability upon the failure to do so. Such is the case herein.

While the Court below did not take up the subject of whether the condition was visible to inspection and supervision, the District Court's decision clearly pointed out that the improper rig was "on the deck" from bolt to turnbuckle (p. 10), all in accordance with the uncontradicted proof that the preventer was rigged on the open deck of the vessel (21-24, 88).[3]

The Court of Appeals did not deny that the knotless rigging was on the deck but stated (although the District Court had been absolutely silent in the matter) that a "minute, continuous supervision of every detail" would have been necessary to detect the condition, a condition that was on the open deck during six hours of actual work operation and a fundamental part of the overall operation affecting the safety of the entire ship to such extent that the failure to properly rig caused the collapse of the ship's boom with its consequent injuries and damages.

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[3] Pages of the trial transcript.

Further, no mention at all was made of the duty of the stevedore to properly inspect and supervise the operation when once again the uncontroverted evidence was that he was to inspect this most important rigging routine to assure its safety during the cargo operation (9, 13, 41-42, 45, 322).

Such lack of proper inspection of the rigging by the stevedore boss so as to detect the lack of the knot was a failure to perform in a workmanlike manner, *Palazzo* v. *Pan-Atlantic,* 211 F. 2d 277 (2C), *sub nom. Ryan* v. *Pan-Atlantic,* 350 U. S. 124; *Italia* v. *Oregon,* 376 U. S. 315; *Calmar* v. *Nacirema,* 266 F. 2d 79 (4C); *Smith* v. *Jugosalvenska,* 278 F. 2d 176 (4C); *Ferrante* v. *Swedish,* 331 F. 2d 571 (3C); *Nicroli* v. *Den,* 332 F. 2d 651 (2C); *DeGioia* v. *United,* 304 F. 2d 421 (2C); *Caputo* v. *United,* 311 F. 2d 413 (2C); *Santomarco* v. *United States,* 277 F. 2d 255 (2C), giving raise to liability of the shipowner, with indemnification over from the stevedore.

We are now faced with the situation of failure of a District Court to make any determination on this most important of issues, and an affirmance by the Court below, not on any factual basis (since there was none) but on the use of one word taken out of context in the discussion of another issue.

This issue of shipowner and stevedore duty to inspect, etc., has more and more frequently come before various Courts of Appeals in recent years, arising out of the concept that the shipowner cannot surrender control over its ship to evade its duty to provide business invitees with a seaworthy vessel, *Alaska* v. *Petterson,* 347 U. S. 396. While in this matter petitioner created the unseaworthy condition, shipowner's liability was predicated, *inter alia,* upon the intervening failure of the shipowner and stevedore to fulfill their duties to inspect, detect and correct that condition, as laid down by this Court in *Weyerhaeuser* v. *Nacirema,*

supra. This Court must now decide whether an open, dangerous condition for a period of six working hours and twenty-one hours in all, remaining dangerous through periods when there was or should have been an inspection by either or both the shipowner and stevedore, can be laid only at the feet of its creator, for if that is so the effect of the *Petterson* decision concerning shipowner's primary duty has been utterly destroyed. Not only did the shipowner herein improperly surrender control over its vessel but it did so to one longshoreman, the petitioner. It is truly amazing how the petitioner's mistake, made so long before the accident, through work periods when inspection was required, through periods of changes in the boom position requiring inspection, through changes in cargo requiring inspection, was still considered the sole cause of all that befell him,[4] while those in command stood aside, did nothing—and now innocently cluck their tongues.[5]

For the destruction of this Court's decisions, in negating the shipowner's and stevedore's primary duty to watch over

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[4] The cases cited by respondent-impleaded on page 4 of its brief in opposition concern matters in which there was no time element between plaintiff's wrongful act and the accident. As such they are not material herein.

[5] A similar situation arose in *Ballwanz* v. *Isthmian*, 319 F. 2d 457 (4C), in which the Fourth Circuit rejected the concept of plaintiff-longshoreman's contributory negligence for injuries sustained during the loading of cargo, in operation for three hours.

> "The plaintiff longshoreman was at the bottom of the hierarchy of command and we fail to see how we can be held responsible for the manner of operations of the stevedore company. The defendant ship owner has a general responsibility for the manner in which the loading operations on his vessel were carried out. If it was negligent and dangerous to 'sling' the spreaders up instead of passing them up, then this manner of operation had been going on under the general supervision of the ship owner and the particular supervision of the stevedore company for nearly three hours before the injury occurred" (p. 460).

the vessel, petitioner submits that this Court should consider, at this time, what responsibility is demanded of the shipowner and of the stevedore so as to provide a known basis of safety to the working gangs, all in accordance with decisions of this Court and various Courts of Appeals, cited above.

CONCLUSION

A writ of certiorari should be granted in accordance with the prayer of the petition.

Dated: October 11, 1965.

Respectfully submitted,

GOLDSTEIN & STERENFELD,
Counsel for Petitioner,
50 Broadway,
New York, New York 10004.

ALVIN P. APFELBERG,
of Counsel.

HARVEY GOLDSTEIN,
on the Brief.